Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–1194 OF 2005
JAMES FOONG, KN SEGARA AND ABU SAMAH JJCA
14 MARCH 2008

Civil Procedure — Judgments and orders — Judgment in default — Claim for unliquidated damages to be assessed and costs — Whether claim fell within O 13 r 2 of the Rules of the High Court 1980 — Whether within rules for judgment in default to be entered without motion — Whether judgment in default void ex debito justitiae

Civil Procedure — Service — Post, service by — AR registered post not acknowledged by defendant — Whether valid service — Whether plaintiffs must prove that person so named received writ and statement of claim

Civil Procedure — Service — Post, service by — Service by way of AR registered post — Acknowledgment card not returned — Whether service proper — Whether evidence of posting sufficient

Civil Procedure — Setting aside — Default judgment — Grounds for — Whether not properly served on defendants — Whether judgment irregular

Companies and Corporations — Directors — Liabilities — Claim involving conspiracy, breach of fiduciary duty and breach of trust — Whether personal claims — Whether involved matters beyond bounds of general protection offered to director of company — Whether director personally liable

The plaintiffs instituted the present suit against the first defendant, a company, and the second to sixth defendants, the directors of the first defendant. The plaintiffs' claim against the defendants was premised upon, inter alia, breach of contract, conspiracy, breach of their duties as fiduciaries and/or constructive trustees to the plaintiffs and breach of trust. The writ and statement of claim were served on all the defendants by way of prepaid AR registered post. The fourth defendant accepted the service on behalf of the second to sixth defendants and the AR registered post acknowledgement card

for the service on the sixth defendant was not returned by the post office. As only the first defendant had entered memorandum of appearance, the plaintiffs entered judgment in default against the second to sixth defendants. The second to sixth defendants sought to set aside the judgment in default on the grounds that the fourth defendant had received the writ and statement of claim meant for all the defendants but did not inform the chairman of the first defendant and that they believed that the solicitor acting for the first defendant would automatically represent them. However, only two affidavits, by the second and fourth defendants respectively, were filed to support the application. The application was dismissed by the High Court and hence this appeal. During the hearing of the appeal, the second to sixth defendants submitted that the judgment in default is void ex debito justitiae for failing to comply with O 13 r 6(1) of the Rules of the High Court 1980 ('RHC').

Held, dismissing the appeal with costs:

(1) Once the writ and statement of claim are sent by AR registered post it is prima facie proof of service unless the defendant is able to rebut it. On the facts, it was clear from the affidavit of the second defendant that he had the knowledge that the writ and statement of claim were served on the first defendant, of which he was a director, and he had even instructed the solicitors to act for the first defendant. It was also clear from the affidavit of the fourth defendant that the second defendant had the knowledge that the writ and statement of claim were served on him. Thus, the second defendant had not rebutted the presumption that the writ and statement of claim were served on him (see paras 21–22).

(2) Further, the claim against the second and the other defendant was one of conspiracy, breach of fiduciary duty as well as breach of trust which were matters beyond the bounds of the general protection offered to a director of a company. These were personal claims against the second defendant and he had not disclosed a defence on merit that ought to be tried. In any event, the agreements between the plaintiffs and the first defendant merely contained terms of a transaction between the parties and they did not exempt the defendant from personal acts alleged to be committed by him (see para 24).

(3) The fourth defendant's excuse that he was under the impression that the second defendant would engage counsel to represent him and the rest of the defendants was not a reasonable ground to warrant a finding that the judgment in default against him was irregular. Further, the claim against the fourth defendant was over and above the exemption of a director from liability and debts of a company. The claim was also a

personal one, for the events that had occurred before he relinquished his role as a director of the first defendant. (see paras 27–28).

(4) The failure by the third and fifth defendants to file an affidavit to support the application rendered the judgment in default, a regular judgment and therefore their application to set it aside must fail. Whereas, the fact that the prepaid AR registered post acknowledgement card of the sixth defendant was not returned did not mean that the service of the writ and statement of claim were defective. Order 10 r 1 of the RHC required that the writ be sent by prepaid AR registered post to the defendant's last known address. Once there was sufficient evidence of posting, then it was deemed to be served on the defendant. There was no necessity to prove that the acknowledgement of the AR registered posting had been returned (see paras 25–26 & 29–30).

(5) In the instant case, the plaintiffs had elected to limit their claim or confine it to only that falling within O 13 r 2 of the RHC. By confining themselves to the claim for unliquidated damages to be assessed and costs in the judgment in default, the plaintiffs had expressly elected to abandon their claim for accounts and declaration which were not within the description of those stated in O 13 rr 1 to 4 of the RHC. Effectively, they had plainly volunteered to relinquish these claims and it entitled them to enter judgment in default against the defendants without the need for a motion to do so (see para 39).

Plaintif-plaintif memulakan guaman ini terhadap defendan pertama, sebuah syarikat, dan defendan-defendan kedua hingga keenam, pengarah-pengarah defendan pertama. Tuntutan plaintif-plaintif terhadap defendan-defendan berasaskan kepada, antara lain, kemungkiran kontrak, konspirasi, pelanggaran kewajipan mereka sebagai fidusiari dan/atau pemegang amanah konstruktif kepada plaintif-plaintif dan pecah amanah. Writ dan pernyataan tuntutan disampaikan kepada kesemua defendan-defendan melalui pos berdaftar bayar dahulu. Defendan keempat menerima penyampaian bagi pihak defendan-defendan kedua hingga keenam dan kad pengakuan penerimaan bagi penyampaian ke atas defendan keenam tidak dikembalikan oleh pejabat pos. Oleh kerana hanya defendan pertama sahaja yang memasukkan memorandum kehadiran, plaintif-plaintif memasukkan penghakiman ingkar terhadap defendan-defendan kedua hingga keenam. Defendan-defendan kedua hingga keenam memohon untuk mengenepikan penghakiman ingkar tersebut atas alasan bahawa defendan keempat telah menerima writ dan penyataan tuntutan yang dihantar kepada kesemua defendan tetapi tidak memberitahu kepada pengerusi defendan pertama dan bahawa mereka menyangka peguamcara yang bertindak bagi pihak defendan pertama akan secara automatik bertindak bagi pihak mereka. Walau bagaimanapun, hanya dua afidavit, oleh defendan-defendan kedua dan

keempat yang difailkan untuk menyokong permohonan tersebut. Permohonan tersebut ditolak oleh Mahkamah Tinggi dan maka rayuan ini. Semasa perbicaraan rayuan, defendan-defendan kedua hingga keenam menghujah bahawa penghakiman ingkar tersebut adalah batal ex debito justitiae kerana gagal mematuhi A 13 k 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak rayuan dengan kos:

(1) Sebaik sahaja writ dan penyataan tuntutan dihantar melalui pos berdaftar bayar dahulu, ia adalah prima facie bukti penyampaian kecuali jika defendan berjaya mematahkannya. Di atas fakta, adalah jelas dari afidavit defendan kedua bahawa dia mempunyai pengetahuan bahawa writ dan penyataan tuntutan telah disampaikan kepada defendan pertama, yang mana dia adalah pengarahnya, dan dia juga telah mengarahkan peguamcaranya untuk bertindak bagi pihak defendan pertama. Ia juga jelas dari afidavit defendan keempat bahawa defendan kedua mempunyai pengetahuan bahawa writ dan penyataan tuntutan tersebut disampaikan kepadanya. Oleh itu, defendan kedua tidak mematahkan anggapan bahawa writ dan penyataan tuntutan telah disampaikan kepadanya (lihat perenggan 21–22).

(2) Selanjutnya, tuntutan terhadap defendan-defendan kedua hingga keenam melibatkan konspirasi, pelanggaran kewajipan fidusiari dan juga pecah amanah yang merupakan perkara-perkara yang di luar batasan perlindungan umum yang diberikan kepada seseorang pengarah syarikat. Ini adalah tuntutan peribadi terhadap defendan kedua dan dia tidak mengemukakan pembelaan bermerit yang mesti dibicarakan. Walau bagaimanapun, perjanjian-perjanjian di antara plaintif-plaintif dan defendan pertama hanya mengandungi terma-terma transaksi di antara pihak-pihak dan ia tidak mengecualikan defendan tersebut daripada tindakan peribadi yang didakwa dilakukan olehnya (lihat perenggan 24).

(3) Alasan defendan keempat bahawa dia beranggapan bahawa defendan kedua akan melantik peguam untuk mewakilinya dan defendan-defendan lain, bukanlah alasan yang munasabah untuk mewajarkan dapatan bahawa penghakiman ingkar terhadapnya adalah di luar aturan. Selanjutnya, tuntutan terhadap defendan keempat adalah di luar pengecualian yang diberikan kepada pengarah terhadap liabiliti dan hutang-hutang syarikat. Tuntutan tersebut juga adalah sesuatu yang peribadi, untuk perkara-perkara yang berlaku sebelum dia melepaskan peranannya sebagai pengarah defendan pertama (lihat perenggan 27 & 28).

(4) Kegagalan defendan-defendan ketiga dan kelima untuk memfailkan afidavit menyokong permohonan menjadikan penghakiman ingkar tersebut, mengikut aturan dan oleh itu permohonan mereka untuk mengenepikannya harus gagal. Manakala, fakta bahawa kad pengakuan penerimaan pos berdaftar bayar dahulu defendan keenam tidak dikembalikan tidak bermaksud bahawa penyampaian writ dan penyataan tuntutan adalah cacat. Aturan 10 k 1 KMT memerlukan writ dihantar melalui pos berdaftar bayar dahulu kepada alamat terakhir defendan. Tidak ada keperluan untuk membuktikan bahawa pengakuan penerimaan pos berdaftar bayar dahulu telah dikembalikan (lihat perenggan 25–26 & 29–30).

(5) Di dalam kes ini, plaintif-plaintif telah memilih untuk menghadkan tuntutan mereka atau untuk menghadkannya dalam lingkungan A 13 k 2 KMT. Dengan menghadkan diri mereka kepada tuntutan untuk gantirugi jumlah tak tertentu yang ditaksir dan kos terhadap penghakiman ingkar tersebut, plaintif-plaintif secara jelas memilih untuk menggugurkan tuntutan mereka untuk akaun-akaun dan deklarasi yang bukan dalam deskripsi yang terkandung di dalam A 13 kk 1 hingga 4 KMT. Jelasnya, mereka telah dengan sukarela melepaskan tuntutan-tuntutan ini dan ia memberi hak kepada mereka untuk memasukkan penghakiman ingkar terhadap defendan-defendan tanpa perlu usul untuk berbuat demikian (lihat perenggan 39).

Notes

For a case on default judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6339.

For a case on liabilities, see para 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 281.

For cases on judgment in default, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4150–4157.

For cases on post, service by, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6249–6254.

Cases referred to

Evans v Bartlam [1937] AC 473 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd [1985] 2 MLJ 429 (refd)

MBf Finance Bhd v Tiong Kieng Seng [2001] MLJU 405; [2001] 4 CLJ 38 (refd)

Morley London Developments Ltd v Rightside Properties Ltd (1973) 117 SJ 876 (refd)

A *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

B **Legislation referred to**
Rules of the High Court 1980 O 10 r 1(1), O 13 r 1, O 13 r 2, O 13 r 3, O 13 r 4, O 13 r 6(1), 42 r 13
Rules of the Supreme Court 1965 O 13 r 6(1)

C
Appeal from: Civil Suit No 22–45 of 2004 (High Court, Temerloh)

Lai Chee Meng (Bahari, Choy & Nongchik) for the appellant.
Umisalamah Abd Latiff (GK Ganesan Saiful & Rokiah) for the respondents.

D
James Foong JCA (delivering judgment of the court):

INTRODUCTION

E **[1]** This appeal concerns only one issue: whether the appellants are allowed to set aside a judgment in default of appearance entered against them. The High Court has dismissed their application to set aside, thus this appeal to us.

BACKGROUND

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[2] The background of this case is relatively straight forward. The plaintiffs have filed this civil suit against six defendants. The first defendant is a company which the plaintiff claims the second to sixth defendants (the appellants in this appeal) are and/or were at all material times directors. The
G causes of action in this suit as mentioned in para 16 of their statement of claim are:

(a) breach of contract;

H (b) conspiracy as between the defendants to injure the plaintiffs;

(c) the defendants' breach of their duties as fiduciaries to the plaintiffs;

(d) the defendants' breach of their duties as constructive trustees to the plaintiffs; and

I (e) the defendants' fraudulent breach of trust.

[3] The reliefs sought by the plaintiffs are:

(1) An account be taken of all sums due from the defendants to the plaintiffs in respect of all the causes of actions;

(1.1) That Messrs A Pathmarajah & Co, Public Accountants, a firm of accounts, or such other fit and proper accountant/s be appointed to take the said accounts;

(1.2) That in order to carry out their duties, the said accountant be granted leave to adopt such procedures as would amount to investigative accounting procedures;

(1.3) In furtherance of their duties, and from time to time, the said accountants be allowed ingress and egress into such venues or places belonging to, in the custody of or under the control of the defendants and/or their servants and/or agents as the accountants may find proper and expedient;

(1.4) In the event the defendants and/or their servants and/or agents refuse to allow access for the accounts in the carrying out of their duties, the accountants be granted leave to enter into.

(2) An order for payment by the defendants to the plaintiffs of all sums found to be due from the defendants to the plaintiffs on the taking of the accounts aforesaid;

(3) A declaration that all sums of moneys in the hands of the defendants are the assets of the plaintiffs;

(4) General damages for:

(a) breach of contract;

(b) fraudulent breach of trust;

(c) the defendants or each of their respective breaches of duties as fiduciary to the plaintiffs;

(d) the defendants' breach of their duties as constructive trustees to the plaintiffs;

(e) the defendants' fraudulent breach of trust;

(5) Interest at the rate of 8% per annum for all sums awarded of all the matters hereinabove pleaded, from the date of the breach up to the date of judgment;

(6) Interest at the rate of 8% per annum for all sums awarded from the date of judgment until full and final settlement;

(7) Costs on a solicitor client basis by reason of the conduct of the defendants; and

(8) Such further and other relief that this honourable court deems fit and proper.

[4] According to the affidavit of service of the plaintiffs' process server, he served the writ and the statement of claim on all the defendants on 5 January 2003 by way of prepaid AR registered post: on the first defendant at No 32, Kampong Baru, Kuala Krau, 28050 Temerloh, Pahang; on the second, third and fourth defendants at No 8, Jalan Besar, Kuala Krau, 28050 Temerloh, Pahang; and on the fifth and sixth defendants at No 32, Kampung Baru, Kuala Krau, 28050, Temerloh, Pahang.

[5] Only the first defendant entered memorandum of appearance, but not the rest of the defendants.

[6] The exhibits attached to the plaintiffs' process server's affidavit reveal that the AR registered post acknowledgment cards for posting to the second to fifth defendants were returned by the post office showing a signature of the recipient and the name of the fourth defendant written thereon. The AR registered post acknowledgment card for service on the sixth defendant was not returned by the post office.

[7] When the second to sixth defendant did not enter appearance within the time stipulated under the Rules of the High Court ('RHC'), the plaintiffs entered judgment in default against these defendants.

[8] This default judgment declares:

> Tidak kehadiran telah dimasukkan oleh Yap Ke Huat, Ong Ah Moy @ Ong Boon Eng, Yap Siew Kian, Yap So Sun dan Yap So Leong, iaitu defendan kedua, ketiga, keempat, kelima dan keenam dalam tindakan ini, maka adalah pada hari ini kehakiman bahawa defendan kedua, ketiga, keempat, kelima dan keenam hendaklah membayar kepada plaintif-plaintif ganti rugi yang akan ditaksirkan.
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> Adalah juga dihakimkan bahawa defendan kedua, ketiga, keempat, kelima dan keenam hendaklah membayar kepada peguamcara pihak plaintif kos yang akan ditaksirkan.

[9] Translated into English, briefly it means that due to the non-appearance of the second to sixth defendant, it is hereby ordered that these defendants do pay the plaintiffs damages to be assessed, as well as costs to be assessed.

[10] A copy of this seal order was served on the second to sixth defendant on 31 December 2004.

[11] On 25 January 2005, the second to sixth defendant applied by way of summons in chambers to set aside this judgment in default. The first ground appearing in this application is that the fourth defendant had received the writ and statement of claim meant for all these defendants but did not inform the chairman of the first defendant. The defendants also believed that the solicitor acting for the first defendant would automatically represent them.

[12] Supporting this application are two affidavits: one by the second defendant and the other by the fourth defendant. The third, fifth and sixth defendant did not file any affidavit in support.

[13] The second defendant affirmed in his affidavit that he did not receive the writ and statement of claim. It was the fourth defendant who received them for the second, third, fifth and sixth defendants. For this reason, he only informed the solicitors to represent the first defendant in this action. He then proceeded to assert that he is only a director of the first defendant. As such, he is not responsible for the debts and liabilities of the first defendant. He stressed that this is disclosed in two agreements signed between the plaintiffs and the first defendant. Further, he claimed that his two sons, the fourth and sixth defendant had ceased to be directors of the first defendant from 30 January 2002.

[14] The fourth defendant's affidavit said that he received the writ and statement of claim but did not inform the second defendant because he himself has ceased to be a director of the first defendant. He only informed the first defendant and under the impression that the second defendant had engaged solicitors to represent the first defendant, all the rest of the defendants would similarly be represented. He only realised the consequences of non-appearance when he received the judgment in default. He then stressed that though he was a director of the first defendant, he is not responsible for the debts and liabilities of the first defendant. Further, he stressed that the first defendant is not liable in view of the two agreements entered into between the plaintiffs and the first defendant. He then said that he has in fact resigned as a director of the first defendant on 30 January 2002.

PRINCIPLES TO BE APPLIED IN AN APPLICATION TO SET ASIDE JUDGMENT IN DEFAULT

[15] It is trite that when considering an application to set aside a judgment in default, the first task is to ascertain whether it is a regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside ex debito justitiae. If it is regularly obtained, then the principle expounded in *Evans v Bartlam* [1937] AC 473 applies — see the judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United*

Malayan Banking Corp Bhd [1994] 1 MLJ 312. This requires the defendant to show that he has a defence on merits. Delay in making such application is a factor to be considered by the court in deciding whether to grant or refuse the application — see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30.

[16] Having perused the grounds of judgment of the High Court, we are of the view that the court below had applied these principles of law correctly when evaluating the application. However, with regards to the ruling by the High Court that the application was made out of time, we regret to say that this finding is wrong in the face of these facts: Judgment in default was served on these defendants on 31 December 2004. They filed this application to set aside on 12 January 2005. This was well within the period of 30 days set out under O 42 r 13 of the RHC to make such application. We believed that the High Court had mistakenly considered the time to run from the date of judgment rather than from the time when the judgment was received by these defendants as provided by O 42 r 13 (RHC) which says:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order or judgment by him*
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> (Emphasis added.)

ANALYSIS

[17] Apart from this, we are of the view that what was decided by the High Court is correct. We apprehend below our reasons for coming to this conclusion. As circumstances faced by each of these defendants is different, we shall deal with them individually in turn.

The second defendant

[18] It is the contention of the second defendant that the learned High Court judge was wrong in deciding that the judgment in default is a regular judgment. He contended that the writ and statement of claim were never served on him in the sense that he never received it. It was received by his son, the fourth defendant, who never informed him of this.

[19] According to O 10 r 1(1) of the RHC:

> Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant *or by sending it by prepaid AR registered post* addressed to his last known address and so far as is practicable, the first attempt at service shall be made not later than one month from the date of issue of the writ
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> (Emphasis added.)

[20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid AR registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67, at p 73:

> In fact under sub-r 1(1) of O 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being 'Yanti' (not the name of the defendants) did not vitiate that service.

[21] This sentiment seems to be repeated in another High Court decision of *MBf Finance Bhd v Tiong Kieng Seng* [2001] MLJU 405; [2001] 4 CLJ 38. Thus, once the writ and statement of claim are sent by AR registered post it is prima facie proof of service unless the defendant is able to rebut this.

[22] Flowing from this, we now need to examine the evidence to ascertain whether this defendant has adduced any creditable evidence to rebut this presumption. From the facts, all that this defendant said in his affidavit was that he did not receive these documents but under the same breath, he disclosed that he had knowledge that the writ and statement of claim were served on the first defendant of which he is a director, and he even instructed solicitors to act for the first defendant. From the affidavit of the fourth defendant, we got to know that upon receipt of the writ and statement of claim by him, he had informed the first defendant. Though he did not reveal who in the first defendant did he inform, but when he said that he was under the impression that the second defendant would engage solicitors to represent all of them, it implies that the second defendant had knowledge that the writ and statement of claim were also served on him otherwise, the fourth defendant would not hold such view. From these facts, we are not convinced that this defendant has rebutted the presumption that the writ and statement of claim were served on him.

[23] When the judgment is a regular judgment, this defendant:

> must show to the court that he has a defence that has some merits of which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail — Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd*.

[24] This leads us to the next question: whether this second defendant has satisfied this condition. Our answer to this is in the negative. The only relevant part of his affidavit associated with this issue is where he said that as a director he is not responsible for the debts and liabilities of the first defendant, and that there were two agreements signed between the first defendant and the plaintiffs. Firstly, even accepting that under the general principle of company law a director is not liable for the debt and liability of the company, the claim against him and the other defendants is one of conspiracy, breach of fiduciary duty as well as breach of trust. These are matters that are beyond the bounds of the general protection offered to a director of a company for debt and liability of the company which he is a director. These are personal claims against him and he has not disclosed a defence on merit that ought to be tried. The agreements between the plaintiffs and the first defendant merely contain terms of a transaction between these two parties. They do not exempt this defendant from personal acts alleged to be committed by him.

The third defendant

[25] The third defendant did not file an affidavit to support the application to set aside. We guess he relied on the affidavits of the second and fourth defendants. But as stated, once it is proved that the writ and statement of claim were posted by prepaid AR registered post to this defendant at his address then it is deemed that he has received it unless he can adduce credible evidence to rebut it. Without an affidavit or an affidavit of another who expressly declares that he is affirming it for and on his behalf, there is no evidence from this particular defendant to show that the writ and statement of claim were not served on him.

[26] When the judgment in default against him is a regular judgment, then he has to show to the court that he has a defence on merit. Without an affidavit or evidence derived from elsewhere to disclose this, then his

application to set aside the judgment in default must fail.

The fourth defendant

[27] In respect of this defendant, the service of the documents on him was good service in view of his admission that he received them personally. His excuse that he was under the impression that the second defendant would engage counsel to represent him and the rest of the defendants is, in our view, not reasonable ground to warrant a finding that the judgment in default against him is irregular.

[28] When the judgment in default is a regular judgment, the next consideration is whether this defendant is able to show that he has a defence on merit. Based on what he has disclosed and those by the second defendant, we found none that can be sustained. His excuse is similar to that of the second defendant that while being a director of the first defendant, he should not be held responsible for the debt and liability of the first defendant, what more when he has resigned from the first defendant since 30 January 2002. But the claim against him, like that of the second defendant, is over and above the exemption of a director from liability and debts of a company. Further, this claim against him is a personal one for events that occurred between 1985 till 2001, well before he relinquished his role as a director of the first defendant. Again, the terms of the two agreements between the plaintiffs and the first defendant do not protect him from these claims of the plaintiffs.

The fifth defendant

[29] This defendant, like the third defendant, did not file an affidavit of his own to support the application to set aside. For the same reasons as expressed in our decision in respect of the third defendant, we find the judgment in default against him a regular judgment. Also, as he has not shown any evidence that he has a defence on merit, the application to set aside must fail.

The sixth defendant

[30] In respect of this defendant, the prepaid AR registered post acknowledgement card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective. What is demanded in O 10 r 1 of the RHC is that the writ (and in this case including the statement of claim) be sent by prepaid AR registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules, the writ (and statement of claim) is deemed to be served on the

defendant. There is no necessity to prove that the acknowledgement of the AR registered posting has been returned. Of course, if it is returned by the post office then it is further proof that it was not only sent but also received. But for the purpose of service, proof of sending by prepaid AR registered post is sufficient.

[31] As the judgment in default is regular, then once again the next issue is whether this defendant has shown that he has a defence on merit. As disclosed, he has not filed an affidavit of his own nor did the second and fourth defendant affirm their respective affidavits on his behalf. Though there is reference in the second defendant affidavit that he has ceased to be a director of the first defendant on 30 January 2002, but the acts complained of by the plaintiffs are against him personally and committed before his resignation as a director. As this defendant has not shown that he has a defence on merit, the application to set aside must again fail.

Order 13 r 6(1) of the RHC

[32] During the hearing of this appeal, the second to sixth defendants' counsel submitted that the judgment in default is void ex debito justitiae for failing to comply with O 13 r 6(1) of the RHC. He elaborated that since the plaintiffs' action contains claims of a description not mentioned in r 1 to 4 of O 13 r 6(1) of the RHC, the plaintiffs cannot enter judgment in default even though the defendants had failed to enter appearance. The plaintiffs were required to 'proceed with the action as if that defendant had entered an appearance'. He then stressed that the plaintiffs should not have entered default judgment against these defendants but to set down the action on motion for judgment. He cited to us the Supreme Court case of *Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd* [1985] 2 MLJ 429 and the Federal Court case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565.

[33] Order 13 r 6(1) of the RHC states:

> Where a writ is endorsed with a claim of a description not mentioned in rr 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

[34] The rational for this is explained in the judgment of Gopal Sri Ram in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor*:

> The philosophy underlying O 13 r 6(1) of the RHC is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon a motion for judgment, that the case is a fit one for the grant of specific relief.

[35] As a refresher, r 1 of O 13 of the RHC refers to claim for liquidated damages; r 2 is claim for unliquidated damages; r 3 is claim for detinue; and r 4 is claim for possession of immovable property. A quick reference to the reliefs sought by the plaintiffs in their statement of claim will immediately reveal that prayer 1 is for accounts; prayer 2 is associated with the first since it is a request for payments of money found due in the accounts; prayer 3 for a declaration; prayer 4 for unliquidated damages for breach of contract, breach of trust, and breach of fiduciary duty. After these, are general claims for interest and costs. From these, it is certain that prayers 1 to 3 are not within rr 1 to 4 of O 13 of the RHC. In fact, the *Supreme Court Practice*, Malaysian Edition (1996 Reprint of 1979 Edition) adopting the English White Book declared at para 13/6/1 that if 'there is endorsement on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr 1– 4, the plaintiff cannot enter judgment in default of appearance, *unless he expressly and finally abandons every such remedy or relief.* (Emphasis added.)

[36] Arguing against this contention, the plaintiffs brought to our attention that they had abandoned their claims for accounts and declaration. They had elected to limit their claim or confine it to only that falling within O 13 r 2 of the RHC. This can be seen from the contents of the judgment in default; it is only for unliquidated damages to be assessed and costs. This is well within the rules for judgment in default to be entered without the need for motion. The claim for accounts and declaration were dropped.

[37] Indeed, according to the English White Book of 1995 under O 13 r 6(1) of the Rules of the Supreme Court 1965:

> The effect of para (1) is to preclude a plaintiff from entering judgment in default of notice of intention to defend in every case in which the indorsement on the writ contains or includes a claim which is not squarely within rr 1 to 4 of this Order, and to require him to proceed with the action as if that defendant had given notice of intention to defend. If, therefore, there is indorsed on the writ a claim for account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr 1–4, the plaintiff cannot enter judgment in default of notice of intention to defend, *unless he expressly and finally abandons every such remedy or relief. On the other hand, the plaintiff is free*

to elect which relief he wants to pursue and he is under no duty to give prior notice of his election to abandon any form or relief which he originally claimed and on the effective abandonment of every remedy or relief outside the descriptions specified in rr 1–4 he is entitled to enter a default judgment under these rules (*Morley London Developments Ltd v Rightside Properties Ltd* [1973] 117 SJ 876).

(Emphasis added.)

[38] So the question before us is whether the plaintiffs had effectively, by only entering judgment in default for unliquidated sum to be assessed and costs, abandoned their claim for relief and remedy which do not fall within the description stipulated in r 1 to 4 of O 13 of the RHC, thereby entitling them to maintain that the judgment in default which they entered against these defendants is a regular judgment, not one that is void ex debito justitiae.

[39] It is our view that by confining themselves to the claim for unliquidated damages to be assessed and costs in the judgment in default, the plaintiffs had expressly elected to abandon their claim for accounts and declaration which are not within the description of those stated in rr 1 to 4 of O 13 of the RHC. Effectively, they had plainly volunteered to relinquish these claims and this is expressly mentioned in the judgment in default itself. This entitled them to enter judgment in default against these defendants without the need for a motion to do so. The English Court of Appeal decision of *Morley London Developments Ltd v Rightside Properties Ltd* (1973) 117 SJ 876 supports this when it was held that the plaintiff was free to choose the relief he wished to pursue, the only requirement being that at the time when the matter came to court he must make it plain what remedy he asked for; he was under no duty to give prior notice to the other side of his election.

[40] For these reasons, we find this last contention of these defendants without merit.

CONCLUSION

[41] Accordingly, we dismissed this appeal with costs. Deposit for this appeal to the respondents towards account of taxed costs.

Appeal dismissed with costs.

Reported by Brendan Navin Siva